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No. 91-2063

In the Supreme Court of the United States

OCTOBER TERM, 1992

COMMODITIES EXPORT CO., PETITIONER

v.

UNITED STATES CUSTOMS SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly determined that, in the circumstances of this case, petitioner's claims involving the government's assessments against it for breach of its warehouse bond should be transferred from the district court to the Court of International Trade.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A19) is reported at 957 F.2d 223. The opinion of the district court (Pet. Supp. 1-16[1]) is unreported. An earlier opinion by the court of appeals in this case (Pet. App. A20-A38) is reported at 888 F.2d 431. An opinion of the Court of Interna-

[1] The district court decision is not included in the appendix to the petition, but was subsequently filed as a separate document. We refer to that document as "Pet. Supp."

tional Trade in a related case between the parties (Pet. App. A39-A52) is reported at 733 F. Supp. 109. The opinion of the Court of Appeals for the Federal Circuit in that case (App., *infra*, 1a-13a) was issued on August 11, 1992, and is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on February 19, 1992. A petition for rehearing was denied (Pet. App. A53) on March 30, 1992. The petition for a writ of certiorari was filed on June 23, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. "Duty-free" stores avoid paying duties and taxes normally due at importation or before sale by storing otherwise dutiable or taxable goods in bonded warehouses. Petitioner's duty-free store is located in Detroit, Michigan, near the entrance to the Ambassador Bridge that connects Detroit with Windsor, Canada. Petitioner's store is the only duty-free store in the United States that is located before the "point of no return"—the point at which a customer carrying goods purchased at the store must check them through customs before bringing them back into the United States. Pet. Supp. 2. Petitioner's customers are supposed to carry their purchases across the bridge into Canada, in which case they are required to go through a customs checkpoint before re-entering the United States; as a practical matter, however, they have the opportunity simply to stay in Detroit. Petitioner's unique location greatly increases the risk of "runaway" goods—that is, goods sold at a duty-free shop on the supposition that they will immedi-

ately be taken out of the United States, but that in fact remain in the United States without payment of the required taxes and duties. *Ibid.*[2]

2. a. Petitioner (like other duty-free sales enterprises) operates under a warehouse bond intended to secure compliance with regulations of the United States Customs Service (Customs) pertaining to storage and marking of merchandise, as well as certain recordkeeping procedures. See 19 U.S.C. 1555, 1623; Pet. App. A23. Customs is authorized to assess liquidated damages, payment of which is secured by the bond, in response to infractions by the store operator. See, *e.g.*, Pet. App. A23; 19 U.S.C. 1623(b); 19 C.F.R. 172.1. Between 1983 and 1987, Customs notified petitioner of more than 20 such assessments for liquidated damages based on breaches of the terms of its bond.[3] After petitioner refused to pay most of these, Customs instituted administrative actions to collect.

In March 1988, petitioner returned to the district court that had granted the 1976 injunction (see note 2,

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[2] In 1976, shortly after petitioner opened for business, the Customs Service determined that all duty-free stores must operate beyond the point of no return. Petitioner obtained a federal district court injunction, however, permitting it to continue at its present location, with surveillance (originally by a person stationed on top of the store, later by videotaping the store's operations) to guard against "runaways." Pet. Supp. 2. Customs' policy was codified at 19 U.S.C. 1555(b)(3)(F)(ii) by Section 1908 of the Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, 102 Stat. 1315-1316, but with an exception for pre-existing stores.

[3] Petitioner implies that $1,000,000 is at stake in this case. Pet. 6. Customs, however, believes that the total amount currently in dispute, including assessments not yet ripe for litigation, is roughly $150,000. See Pet. App. A23-A24.

supra), arguing that Customs was attempting to put it out of business with meritless liquidated damages claims. In August 1988 the district court dismissed petitioner's claim, holding that the United States Court of International Trade (CIT) had exclusive jurisdiction over the subject matter. See Pet. App. A26-A27. On appeal, the Sixth Circuit vacated and remanded for further analysis of the jurisdictional issues, and also ordered the district court to rule on the merits of petitioner's claim that Customs had violated its due process rights. *Id.* A20-A38.

b. While the first appeal to the Sixth Circuit was pending, Customs brought suit in the CIT under 28 U.S.C. 1582(2) to recover on one of the liquidated damage claims. Pet. App. A4-A5. Under Section 1582(2) (Pet. App. A67), the CIT has exclusive jurisdiction over "any civil action which arises out of an import transaction and which is commenced by the United States * * * to recover upon a bond relating to the importation of merchandise." In March 1990, the CIT ruled that the case concerned an "import transaction" and a "bond related to the importation of merchandise" within the meaning of Section 1582(2), and that therefore the CIT had exclusive jurisdiction. Pet. App. A39-A52. On August 11, 1992, the United States Court of Appeals for the Federal Circuit affirmed the CIT's jurisdictional ruling, although it reversed on statute of limitations grounds the CIT's decision granting Customs recovery on the bond. App., *infra*, 13a.

c. In November 1990 the district court, on remand from the Sixth Circuit, granted Customs' motion to dismiss petitioner's case in that court. Adopting the reasoning of the CIT in the government's collection

action, the district court held that the CIT had exclusive jurisdiction over the liquidated damages questions raised in this case. Pet. Supp. 10-12, 16. The district court held further that petitioner had made out no due process claim because it would in any event be entitled to a full and fair hearing before the CIT before Customs could enforce its claim for liquidated damages. *Id.* at 12-15.

d. Petitioner's second appeal to the Sixth Circuit resulted in the decision below. Pet. App. A1-A19. The court of appeals held (*id.* at A13-A14) that by virtue of the CIT's decision, rendered prior to the decision on remand in the district court, the question of the CIT's jurisdiction was "*res judicata.*" Because it determined, after full analysis, that the CIT had the power to decide its own jurisdiction and had properly exercised that power, *id.* at A7-A14, the court of appeals affirmed the district court's ruling that the CIT had exclusive jurisdiction over this action. *Id.* at A13-A14. After further determining (*id.* at A15-A17) that the CIT was fully competent to resolve petitioner's due process claims, the court of appeals vacated the district court's ruling on those claims (*id.* at A14-A15) and instructed the district court to transfer the entire case to the CIT pursuant to 28 U.S.C. 1631. Pet. App. A18.[4]

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[4] The court of appeals noted that if the CIT's jurisdictional determination were reversed on appeal to the Federal Circuit, or if the CIT and the Federal Circuit refused to address petitioner's due process claims after transfer of this case, then petitioner could file a motion for relief from the judgment below under Fed. R. Civ. P. 60(b)(5). Pet. App. A17-A18.

ARGUMENT

The decision below does not conflict with that of any other court of appeals, and is consistent with the decisions of the CIT and the Federal Circuit in a case involving essentially identical facts brought by the government against petitioner. The decision assures petitioner a forum in which to resist enforcement of liquidated damages (as it has done successfully in the Federal Circuit) and to air any related grievances, and provides the CIT with the opportunity to decide in the first instance whether it has jurisdiction to hear a case involving basically the same facts brought by petitioner against the government. Nothing in the case, in its present posture, warrants further review by this Court.

1. Petitioner argues that the decision here conflicts with that of the United States Court of Appeals for the Fourth Circuit in *Trayco, Inc.* v. *United States*, No. 91-2555 (Mar. 2, 1992). We do not agree that the two decisions were at odds.[5] In any event, how-

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[5] In *Trayco*, the Fourth Circuit held that the district court had jurisdiction under 28 U.S.C. 1346(a)(2) over an action by an importer to recover a penalty imposed by the Customs Service for alleged mislabeling of goods. The court held that nothing in 28 U.S.C. 1581 specifically gave the CIT jurisdiction over such a suit. See also *K Mart Corp.* v. *Cartier, Inc.*, 485 U.S. 176 (1988) (Section 1581(i)(3), concerning "embargoes," does not grant CIT jurisdiction over suit contesting Customs' decision to allow entry of certain "gray market" goods). The facts in this case are quite different, and may fall within Section 1581(i)'s specific grant of jurisdiction over suits arising from the substance, administration or enforcement of federal laws concerning revenue from imports. See Pet. App. A18-A19, A37-A38 (opinions of Nelson, J.). That possibility was not present in *Trayco* (or in *K Mart*).

ever, the Fourth Circuit has now vacated its decision and transferred the *Trayco* appeal in its entirety to the Federal Circuit. *Trayco, Inc.* v. *United States*, No. 91-2555 (June 19, 1992).[6]

2. The court of appeals carefully considered (Pet. App. A9-A12) whether the CIT had the judicial authority to determine the scope of its own jurisdiction, and concluded that it did. It then concluded (*id.* at A12-A13) that the CIT's decision on jurisdiction in the enforcement action brought by the United States was reasonable, and that no substantial public interest would be undermined by deferring to that decision. In view of these conclusions, and the fact that the CIT had already upheld its own jurisdiction in a case between the same parties involving essentially identical facts,[7] the court deferred to the

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[6] In its order granting the government's request for rehearing in *Trayco*, the Fourth Circuit recognized that 28 U.S.C. 1295(a)(2) gives the Federal Circuit exclusive jurisdiction over appeals where district court jurisdiction was based in whole or in part on 28 U.S.C. 1346(a)(2). Since the court had determined that the district court's jurisdiction was based on Section 1346(a)(2), transfer to the Federal Circuit was mandatory. Slip op. 2.

[7] The court correctly recognized that the decisions of the CIT and the Federal Circuit on issues already fully and fairly litigated between Customs and petitioner and necessarily decided by those courts in the course of Customs' enforcement action should be afforded preclusive effect in subsequent litigation between the parties. See Pet. App. A7-A8, A13-A14. See generally, *e.g.*, *Allen* v. *McCurry*, 449 U.S. 90, 90-91 (1980); 18 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 4416 (1981 & Supp. 1992). In upholding the CIT's jurisdiction over the enforcement action, the Federal Circuit necessarily (and explicitly, App., *infra*, 7a) decided that in "bringing [foreign] merchandise

CIT's decision and, "in the interest of judicial economy," Pet. App. 18a, ordered this case transferred to the CIT under 28 U.S.C. 1631.

It will of course remain for the CIT, after the transfer, to consider in the first instance whether a case of this nature—one filed by an importer challenging Customs' administrative actions with respect to a warehouse bond, in the absence of an enforcement action on the bond brought by Customs in the CIT—can be maintained at all.[8] That is a question that has not yet, to our knowledge, been decided by any appellate court, in this or any other case.[9] Should the CIT (and the Federal Circuit) decide that peti-

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into the United States, [petitioner] conducted an 'import transaction'" and that petitioner's warehouse bond is "a bond relating to the importation of merchandise" within the meaning of 28 U.S.C. 1582(2). These rulings, which need not be relitigated between the parties, will be highly relevant to any determination of whether the CIT has jurisdiction over this related action under 28 U.S.C. 1581, and particularly under Section 1581(i). See Pet. App. A18-A19, A37-A38 (opinions of Nelson, J.).

[8] If the action is cognizable at all, it may be that the propriety of the CIT as the forum for this particular case has been settled, as law of the case, by the Sixth Circuit's decision. See *Christianson* v. *Colt Indus. Operating Corp.*, 486 U.S. 800, 819 (1988). We note, however, that *Christianson* involved a transfer between two appellate courts, rather than a transfer for purposes of trial, and that the specific limiting language of 28 U.S.C. 1631 (permitting transfer to a court "in which the action * * * could have been brought") would have to be considered. See *Hoffman* v. *Blaski*, 363 U.S. 335, 340-344 & n.9 (1960).

[9] Judge Nelson, in his separate opinion in the first appeal, did suggest that under 28 U.S.C. 1581(i) the CIT would have exclusive jurisdiction of such a suit. Pet. App. A37.

tioner cannot bring such an action directly, however, petitioner will not be without remedy or adequate process. The most obvious method for petitioner to challenge any Customs assessment (or alleged collateral misconduct) in court would be, as the district court held (see, *e.g.*, Pet. Supp. 12-13), to wait for the action that Customs would be required to bring in the CIT in order to enforce its assessment. In that case the CIT would have incontrovertible jurisdiction based on 28 U.S.C. 1582, and the court of appeals has held (Pet. App. A15-A17) that the CIT would have full power to consider and decide petitioner's constitutional or other claims.[10] Moreover, should the CIT or the Federal Circuit deny jurisdiction or leave petitioner's constitutional claims "wholly unaddressed," the Sixth Circuit has explicitly indicated (Pet. App. A17-A18) that it would entertain a motion by petitioner under Fed. R. Civ. Proc. 60 (b)(5) to revisit its judgment in this case.

The decision below thus leaves petitioner with the ability to pursue this litigation in the first instance in the CIT and the Federal Circuit, and makes clear that petitioner will not be left without any forum in which to raise its claims. Under the circumstances, we believe that review by this Court at this juncture is unwarranted and would be premature.

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[10] Indeed, petitioner succeeded in the Federal Circuit in having the CIT's judgment enforcing some Customs assessments reversed on statute of limitations grounds. App., *infra*, 8a-13a.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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AUGUST 1992

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

91-1470, -1482

THE UNITED STATES, PLAINTIFF-APPELLEE

v.

COMMODITIES EXPORT CO., DEFENDANT-APPELLANT

and

OLD REPUBLIC INSURANCE CO.,
DEFENDANT-APPELLANT

DECIDED: August 11, 1992

Before ARCHER, *Circuit Judge*, BENNETT, *Senior Circuit Judge*, and RADER, *Circuit Judge*.

RADER, *Circuit Judge*.

The United States sued Commodities Export Company and Old Republic Insurance Company in the United States Court of International Trade to recover unpaid liquidated damages under a customs warehouse bond. The trial court entered judgment

in favor of the United States. *United States v. Commodities Export Co. & Old Republic Ins. Co.*, CIT No. 89-03-00144, May 14, 1991. Because the United States did not file its action within the six year statute of limitation, 28 U.S.C. § 2415(a) (1988), this court reverses.

BACKGROUND

Section 1557(a) of Title 19 (1988) allows an importer to store imported foreign merchandise in a bonded warehouse for up to five years from the date of importation without paying duties. An importer must pay duties on merchandise removed from storage for consumption within this country. *Id.* An importer pays no duties, however, on merchandise withdrawn from storage for export. *Id.*

Commodities sells both domestic and foreign goods from its duty-free store. This store lies directly adjacent to the Canadian border in Detroit., Commodities stores its merchandise in a bonded warehouse under 19 U.S.C. § 1557(a). As a duty-free sales enterprise, Commodities sells its merchandise in export only. *See* 19 U.S.C. § 1555(b) (1988). Thus, Commodities sells its merchandise to persons immediately leaving the United States to enter Canada. In the event of a sale to persons remaining in the United States, Commodities must collect duties. *See United States v. Commodities Export Co.*, 733 F. Supp. 109, 110 (Ct. Int'l Trade 1990) (*Commodities I*).

"To insure payment of duties and other charges due to runaways and other infractions," the United States entered into a warehouse bond agreement with Commodities, as principal, and Old Republic Insur-

ance, as surety. *Id.* Under the agreement, Commodities and Old Republic jointly and severally promised to pay liquidated damages of $100 for each violation of the bond's terms. Moreover, they agreed to pay liquidated damages of five times the duty and tax on any dutiable merchandise removed from the warehouse without the Customs Service's approval. The bond required Commodities to mark its merchandise correctly and to notify Customs of any inventory discrepancies.

On February 22, 1983, Customs conducted a spot check of Commodities' warehouse. The investigation revealed that Commodities had not properly marked 37 warehouse entries and had not notified Customs of inventory shortages in seven entries. On March 21, 1983, Customs sent Commodities a demand for payment of liquidated damages for breach of the bond. *See* 19 C.F.R. 172.1(a) (1982). The demand required Commodities to pay $6,293.96 or petition for relief within 60 days. On May 19, 1983, Commodities objected to the assessment of liquidated damages. Customs denied Commodities' petition on November 4, 1987. On November 20, 1987, Customs formally demanded payment by Old Republic within 30 days. On February 20, 1988, March 5, 1988, and March 19, 1988, Customs issued bills to Commodities and Old Republic for payment of the liquidated damages. Neither defendant paid Customs.

On March 17, 1989, the United States brought this action against Commodities and Old Republic to recover the unpaid liquidated damages. The trial court denied defendants' motion to dismiss for lack of subject matter jurisdiction. *Commodities I.* Defendants then moved to dismiss because the statute of limitations had run and because Customs had actually

liquidated the goods duty-free. The trial court denied this motion also. *United States v. Commodities Export Co.*, 755 F. Supp. 418 (Ct. Int'l Trade 1991) (*Commodities II*).

At trial, the jury affirmed the validity of the bond agreement and found that Commodities had breached the bond. On May 14, 1991, the court entered judgment in favor of the United States.

DISCUSSION

I.

Section 1582 of Title 28 (1988) sets forth exclusive jurisdiction for the Court of International Trade:

> The Court of International Trade shall have exclusive jurisdiction of any civil action which arises out of an import transaction and which is commenced by the United States—
>
> > (1) to recover a civil penalty under section 592, 641(b)(6), 641(d)(2)(A), 704(i)(2), or 734(i)(2) of the Tariff Act of 1930;
> >
> > (2) to recover upon a bond relating to the importation of merchandise required by the laws of the United States or by the Secretary of the Treasury; or
> >
> > (3) to recover customs duties.

Thus, to fall within the exclusive jurisdiction of the Court of International Trade, this action to recover on a bond must be "commenced by the United States," "arise[] out of an import transaction," and "relat[e] to the importation of merchandise required by the laws of the United States or by the Secretary of the Treasury." *Id.*

The United States' commencement of this action satisfies the first element. The second and third elements require this court to construe the terms "import transaction" and "importation." Specifically this court must determine whether foreign goods in a bonded warehouse are "imported" within the meaning of 28 U.S.C. § 1582(2). The statutes governing bonded warehouses repeatedly refer to warehouse goods as imports. For instance, 19 U.S.C. § 1557(a) permits an importer to store merchandise in a bonded warehouse without payment of duties for up to five years from the date of "importation." Section 1557 thus considers goods imported upon their entry into this country, rather than upon payment of duties before merchandise enters domestic commerce.

Similarly, section 1555(a) of Title 19—the statute authorizing Commodities' and Old Republic's bond—refers to "imported" merchandise in customs bonded warehouses. Thus, goods in bonded warehouses are "imported" upon entry into this country and storage in a bonded warehouse. The importer need pay no duties to "import" merchandise stored in its warehouse. The Supreme Court has adopted the language of Title 19 in referring to goods in bonded warehouses. *R.J. Reynolds Tobacco Co. v. Durham County*, 479 U.S. 130, 134 n.3 (1986) ("Goods may remain in a customs-bonded warehouse for up to five years from the date of importation . . . ."); *see also Xerox Corp. v. County of Harris*, 459 U.S. 145, 150 (1982) ("Congress established a comprehensive customs system which includes provisions for Government-supervised bonded warehouses where imports may be stored duty free for prescribed periods."); *Cunard S.S. Co. v. Mellon*, 262 U.S. 100, 122 (1923) ("If

there be an actual bringing in it is importation regardless of the mode in which it is effected. Entry through a custom house is not of the essence of the act.").

In *Stone & Downer Co. v. United States*, 19 CCPA 259, 264 (1931), *cert. denied*, 287 U.S. 619 (1932), this court's predecessor noted that "importation" has a different meaning for the timing of duty payments. *Stone & Downer* clarified that Title 19 requires Customs to assess duties at the time foreign goods in a bonded warehouse enter into domestic commerce, rather than at the time these goods enter the warehouse. *Id.* In that context, Customs collects duties on "imported" goods upon entry into domestic commerce. Because this appeal does not concern the timing of duty assessments, *Stone & Downer* is not applicable.

By referring to "import transaction" or "importation of merchandise," 28 U.S.C. § 1582 gave the Court of International Trade jurisdiction over bonded warehouses. The phraseology of section 1582 underscores the breadth of this jurisdictional grant. A civil action need only arise out of an import transaction to fall within the court's jurisdiction. Moreover a bond need only relate to importation. This broad language commits a wide spectrum of controversies concerning the importation process to the Court of International Trade.

The legislative history of section 1582 also supports the breadth of the jurisdictional grant to the Court of International Trade. The House report accompanying the 1980 rewrite of this provision described the court's jurisdiction as "a comprehensive system of judicial review of civil actions arising from import transactions." H.R. Rep. No. 1235, 96th

Cong., 2d Sess. 20 (1980), *reprinted in* 1980 U.S.C.C.A.N. 3729, 3731.

Under the terms of 28 U.S.C. § 1582(2), this action against Commodities falls within the jurisdiction of the Court of International Trade. The United States brought the action. Two-thirds of the merchandise in Commodities' warehouse is foreign. By bringing this merchandise into the United States, Commodities conducted an "import transaction." This civil action thus "arises out of an import transaction," satisfying the second jurisdictional requirement of 28 U.S.C. § 1582(2).

Finally, the bond in this case relates to importation in at least two ways. The bond's terms deal with Commodities' documentation and manipulation of imported merchandise in its warehouse. The bond also ensures payment of duties on imported merchandise in the event those duties become payable. Therefore, Commodities' bond "relat[es] to the importation of merchandise," satisfying the third element of 28 U.S.C. § 1582(2). The trial court therefore properly exercised jurisdiction over this action.

II.

This court must next determine the statute of limitations which applies to this action. Section 1621 of Title 19 sets forth a five-year limitation on any "suit or action to recover any pecuniary penalty or forfeiture of property accruing under the customs laws." 19 U.S.C. § 1621 (1988). Section 2415(a) of Title 28 provides a six-year limitation on "every action . . . brought by the United States or an officer or agency thereof which is founded upon any contract," 28 U.S.C. § 2415(a).

The five-year statute of limitations in 19 U.S.C. § 1621 does not apply in this case because the United States does not seek "pecuniary penalt[ies] . . . accruing under the customs laws." *See also United States v. Imperial Food Imports*, 834 F.2d 1013, 1016, 6 Fed. Cir. (T) 37, 40 (1987) ("Liquidated damages are not penalties if they are reasonable and the exact amount of the damages sustained would be difficult to prove."). Rather, the United States brought this action to recover liquidated damages under the terms of a contract, the bond agreement. Because "founded upon [a] contract," this action falls within the language of 28 U.S.C. § 2415. Therefore, the trial court properly applied a limitations period of six years in this case.

III.

Finally this court must decide whether the United States filed this action within the applicable statutory period. Under 28 U.S.C. § 2415(a), the United States may not bring an action "unless the complaint is filed within six years after the right of action accrues."

The trial court determined that the Government's right of action accrued on May 20, 1983, after Customs followed its own regulations. *Commodities II*, 755 F. Supp. at 422. In these regulations Customs imposes on itself the requirement to demand payment from a party who has not met the conditions of a customs bond. 19 C.F.R. § 172.1(a).[1] If that party

[1] It appears that Customs may not have adhered strictly to its regulations. Section 172.1(a) of Title 19 of the Code of Federal Regulations (1982) requires Customs to notify the surety of liability on the bond "at the same time as the

does not pay within 60 days of Customs' mailing of notice, "the district director of Customs, after required collection action, shall refer the claim promptly to the United States attorney." 19 C.F.R. § 172.2(a) (1982).

As a general principle, this court recognizes that "[u]nder federal law governing statutes of limitations, a cause of action accrues when all events necessary to state a claim have occurred." *Chevron U.S.A. v. United States*, 923 F.2d 830, 834 (Fed. Cir.), *cert. denied*, 112 S. Ct. 167 (1991); *Nager Elec. Co. v. United States*, 368 F.2d 847, 851-52 (Ct. Cl. 1966). The Supreme Court also has long recognized this general rule. *United States v. Lindsay*, 346 U.S. 568, 569 (1954) ("In common parlance a right accrues when it comes into existence . . . ."); *Unexcelled Chem. v. United States*, 345 U.S. 59, 65 (1953) ("A cause of action is created when there is a breach of duty owed the plaintiff. It is that breach of duty, not its discovery, that normally is controlling").

This court must assess, however, the effect of Customs' regulations on this general rule for accrual of a right of action. In *Crown Coat Front Co. v. United States*, 386 U.S. 503, 509-11 (1967), the Supreme Court permitted a Government contract's disputes clause to delay accrual of a right of action arising under the contract. The contract bound the contractor

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principal." According to the original complaint in this action, the United States made a formal demand on Old Republic on November 20, 1987—over four years after it made a demand on Commodities. The only other evidence of record before this court on this issue, Customs' own automated billing record, gives November 16, 1987, as a date Customs made a demand on the surety.

to exhaust administrative remedies before instituting suit. *Id.* at 511-12. Where the parties had agreed in advance to a condition on the filing of a suit, the Supreme Court gave effect to that agreement by delaying accrual of the right of action.

In this case, however, the parties have not agreed to conditions on institution of a suit, rather Customs has unilaterally adopted regulations which delay filing of actions. The bond agreement does not require Customs to demand payment or to send notice before suing Commodities or Old Republic. The bond does not require Customs to wait 60 days for a response to the demand before suing. Moreover, Customs' regulations do not state that commencement of the statutory period is postponed until after Customs gives notice and waits 60 days for a response. No statute requires Customs to give notice of demand for liquidated damages before suing. Without agreement of the parties or statutory obligations delaying the institution of suit, the general rule for accrual of a right of action still applies.[2]

The trial court erred in postponing commencement of the limitations period until after Customs complied with its own regulations. While Customs' self-imposed internal procedures, may constrain its right to sue, a question we do not decide here, they cannot change the defendants' right to repose after

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[2] Under the bond agreement, Old Republic agreed to pay liquidated damages "[i]f principal defaults." The bond agreement did not require Customs to demand payment from Old Republic before suing. Thus, under the terms of the bond, Old Republic incurred liability to Customs when Commodities breached the bond. Customs' right of action against Old Republic therefore accrued at the same time its right of action accrued against Commodities.

the statutory six-year period. Customs' internal procedures are a unilateral effort to settle the dispute without resort to legal action.[3] This court cannot, however, permit a single party to postpone unilaterally and indefinitely the running of the statute of limitations.

By its terms, 28 U.S.C § 2415 is subject also to statutory exceptions to the general rule regarding accrual of causes of action. The relevant statute, 28 U.S.C. § 2416 (1988), states:

> For the purpose of computing the limitations periods established in section 2415, there shall be excluded all periods during which—
>
> . . . .
>
> (c) facts material to the right of action are not known and reasonably could not be known by an official of the United States charged with the responsibility to act in the circumstances . . . .

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[3] The Supreme Court has referred in dicta to 28 U.S.C. § 2415 as "a statute aimed at equalizing the litigative opportunities between the Government and private parties." *Crown Coat Front Co. v. United States*, 386 U.S. 503, 521 (1967). The Supreme Court noted that "[t]he congressional intent to 'put the Government on a parity with those private litigants who may sue' and 'to equalize the position of litigants' is sufficiently evident." *Id.* at 521 n.14 (citations omitted).

The intent of "equality" is not served by allowing the Government to unilaterally postpone accrual of a cause of action. A private corporation suing the Government may not stall the commencement of the statute of limitations merely with in-house proceedings which precede any lawsuit. Similarly, the Government may not indefinitely postpone the running of the statute merely by taking the steps any prudent litigant would take before bringing a lawsuit.

[4] While acknowledging that this subsection would primarily apply to cases of fraudulent concealment of Government

The language of section 2416(c) requires this court to examine the nature of the "facts material to the right of action." Only facts which could not reasonably be known by a relevant Government official postpone accrual. Under the facts of this case, relevant Government officials reasonably could have known of the cause of action before March 17, 1983. Thus, in the words of our sister circuits, "once the facts making up the 'very essence of the right of action' are reasonably knowable, the § 2416 bar is dropped." *United States v. Gavilan Joint Community College Dist.*, 849 F.2d 1246, 1250 (9th Cir. 1988) (quoting *United States v. Kass*, 740 F.2d 1493, 1497 (11th Cir. 1984) (quoting S. Rep. No. 1328, 89th Cong., 2d Sess. 6 (1966), *reprinted in* 1966 U.S.C.C.A.N. 2502, 2508)).

Section 2416(c) does not postpone accrual of the Government's cause of action beyond March 17, 1983. On February 22, 1983, Customs inspected Commodities' warehouse. These inspecting officials found that Commodities had not marked some merchandise with

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causes of action, Congress recognized that the complexities and size of the Government could impede responsible officials' knowledge of material facts. S. Rep. No. 1328, 89th Cong., 2d Sess. 6 (1966), *reprinted in* 1966 U.S.C.C.A.N. 2502, 2507; *see also United States v. Kass*, 740 F.2d 1493, 1497 (11th Cir. 1984). The legislative history of section 2416(c) explains:

> It is not intended that the application of this exclusion will require the knowledge at the highest level of the Government. Responsibility in such matters may extend down into lower managerial levels within an agency. As a general proposition, the responsible official would be the official who is also responsible for the activity out of which the action arose.

S. Rep. No. 1328 at 6.

proper warehouse entry numbers. The absence of the markings breached the bond. Simply viewing the boxes made this blatant breach apparent. Thus, because the Government's right of action accrued before March 17, 1983, this action is time barred.

CONCLUSION

The Court of International Trade properly asserted jurisdiction over this action. That court also applied the proper statute of limitations. However, that court erred in finding that the Government had filed its action within the six-year time bar.

REVERSED

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